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September 10, 2002

VIA FACSIMILE AND FEDERAL EXPRESS

Annette Lang
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

This was done orally.

Dear Annette:

This letter comes in response to the United States' settlement demand of a total of $416,673 from all of the "Martin Clarke" entities – Clarke's Incinerators, Inc. ("CII"), Clarke Container, Inc., and Martin Clarke - involved in the Skinner Landfill case. As a preliminary matter, Mr. Clarke appreciates your efforts in attempting to arrive at a reasoned determination of the Martin Clarke entities' fair share of liability relating to the Skinner site. However, Mr. Clarke does not agree with the assumptions set forth in your analysis. Based upon a different set of assumptions, and facts that are set forth in the record developed in this case, Mr. Clarke believes a settlement in the amount of $116,358 is more appropriate. The bases for this amount are set forth below.

Pre-1967 Payments to Skinner

The Martin Clarke entities strongly disagree with your assumption that Tom Clarke transported hazardous substances to the Skinner Site prior to 1967. First, most of these entries are from 1963, with a separate entry from 1956. Given that Tom Clarke was essentially in the same business as the Skinners, and given that the record demonstrates that Tom Clarke was in dire financial straits in the early 1960's because of his investment in his nascent incineration business, it is highly unlikely that he would have paid Mr. Skinner to dispose of waste materials. Rather, Tom Clarke likely paid the Skinners for products such as steel for the erection of the incinerators or gravel for the driveway or roadways at 2040 East Kemper Road. Although Mrs. Skinner believed those entries related to dumping, her testimony demonstrates that she functioned largely as a bookkeeper and took no meaningful part in any of Mr. Skinner's businesses. In all probability, she received checks from Tom Clarke and simply credited them as "dumping" in her ledger.

The foregoing argument does not even raise the issue of the total lack of all evidence as to what, if anything, Tom Clarke may have transported to the Skinner site in those years. Unless a court is willing to infer that *every* shipment of material ever transported to Skinner contained hazardous substances, it is difficult to understand how the government or the PRPs could prove that these particular entries in the Skinner Log reflect the disposal of hazardous substances.

Alleged pre-1967 shipments of "so-called cyanide waste"

Although the documents arising from Ford's alleged shipment of "so called cyanide waste" to the Skinner Landfill make for interesting reading, they provide no admissible basis for any liability of the Martin Clarke entities.

First, the only evidence that remotely gives rise to an inference that CII bears any liability for the alleged shipment of Ford's "cyanide waste" to Skinner is Tom Clarke's September 1964 affidavit. Such an affidavit would not likely be admissible in any legal proceeding against the Martin Clarke entities. Obviously, Tom Clarke is unavailable to testify. As such, the only plausible way in which the affidavit would not be considered hearsay would be as a "statement against interest." F.R.E. § 804(b)(3). However, the affidavit does not fall under this hearsay exception, because the statement was *not* against Tom Clarke's interest, and because, given the circumstances, there is serious doubt as to its truthfulness.

Although the affidavit is operating as a statement against CII's interest in *this* case, it did not operate as a statement against CII's interest in 1964, because CII did not exist in 1964. More importantly, Tom Clarke does not appear to have been a party in the case of Brackney v. Skinner. Nor did Butler County have any cause of action against Mr. Clarke for, at most, redirecting a Ford truck laden with Ford waste, and driven by a Ford employee, to the Skinner site.

Instead, given the circumstances, a more likely scenario is that a *lack* of a statement by Mr. Clarke would have operated against his pecuniary interest. Based upon the testimony in the record, Ford was one of Mr. Clarke's regular customers, and, given his financial circumstances at the time, he presumably would have done nothing to endanger his relationship with (and cash flow from) Ford. Indeed, the documents that are set forth in the record, setting aside their status as hearsay, strongly suggest that Ford exerted tremendous pressure on Mr. Clarke to sign an affidavit to allay some of the pressure apparently being applied to Ford by Butler County officials.

Even if the affidavit is somehow admissible into evidence, in light of the circumstances described above, the fact that Mr. Clarke is dead and can't be cross-examined, and other pertinent facts, it is doubtful that the Court would afford the affidavit little, if any, weight. First, the living witnesses who were marginally involved in the supposed shipment of materials from Ford to Skinner provide no admissible evidence that supports the government's position with respect to Ford's "cyanide" shipment. Neither Mr. Dent nor Mr. Wilbur has any firsthand knowledge or recollection of the alleged shipments. Mr. Dent's memorandum was based only upon what Mr. Oliver, the alleged truck driver, told him. As such, all statements from these witnesses relating to the alleged shipments of "cyanide waste" are inadmissible hearsay.

Second, no one possesses any personal knowledge that the "cyanide waste" allegedly shipped to Skinner in May 1964 contained any hazardous substances. As Mr. Dent testified, his memorandum used the term "so called cyanide waste" because an unknown person apparently told Mr. Oliver that the drums in fact contained cyanide waste. As such, the conclusion that the drums contained cyanide-laden waste based upon this line of evidence is plain hearsay and would be inadmissible at trial.

Third, even if the material in question was somehow shown to be waste generated from the Sharonville heat treatment process, there is no conclusive evidence in the record demonstrating that heat treatment waste in fact contained cyanide. The only evidence of the chemical composition of the "so called cyanide waste" are the two chemical analyses described generally by Mr. Wilbur. One of those analyses showed that the material contained no cyanide (or any other hazardous substance). The other analysis showed that the material contained a "trace" concentration of cyanide. Assuming, only for purposes of argument, that "trace" demonstrates that cyanide was present in the sample, and setting aside myriad issues including the lack of a complete chain of custody, the accuracy (or lack thereof) of the laboratory equipment, and the propriety of the analytical method (none of which are sufficiently documented in the record), there is only a fifty percent chance that the materials Ford allegedly sent to Skinner contained any amount of cyanide. Fifty percent is not enough to carry the government's burden of showing that in the relevant instance, Ford (via 2040 East Kemper Road) shipped cyanide at the Skinner Landfill.

Finally, as a matter of law, there is no evidence that Mr. Clarke "arranged for" the disposal of "so called cyanide waste" at the Skinner site. The Ford purchase orders simply state

> To cover the cost of Incinerator's service for disposal of Buyer's combustible Industrial waste material and cyanide chemicals as delivered to Seller's facilities . . . Buyer to load and haul industrial waste material and cyanide chemicals to Seller's

property located at 2040 Kemper Road, Cincinnati 41, Ohio, for disposal.

Such language in and of itself does not manifest any intent by Mr. Clarke to arrange for the disposal of hazardous substances (assuming the cyanide materials described in the contract in fact contained hazardous substances) at the Skinner Landfill. Nor does this purchase order reflect any obligation that Mr. Clarke dispose of the "so called cyanide waste" at the Skinner Landfill. Absent such intent or obligation, CII cannot be responsible for allegedly arranging for the disposal of the cyanide materials at the Skinner site. See General Electric Co. v. Aamco Transmissions, Inc., 962 F.2d 281 (2nd Cir. 1992); U.S. v. Davis, 1 F. Supp. 2d 125 (D.R.I. 1998); U.S. v. Cello Foil Products, 100 F.3d 1227 (6th Cir. 1996).

Finally, even if Ford in fact shipped five drums of waste that actually contained hazardous substances to the Skinner site by way of 2040 East Kemper Road, there is absolutely no basis in the record for arbitrarily claiming that Tom Clarke shipped 60 drums of hazardous-substance containing waste there. Given that there is no testimony on the volume of waste generated by this process, and given that a single alleged shipment six years after the shipments allegedly began ignited the local governments and community, it is hard to see how any court would draw an inference that 60 drums were sent to the site. After overcoming all of the evidentiary and legal hurdles described above, there is little doubt that, at most, a court would conclude that Tom Clarke arranged for the disposal of five drums of containing a hazardous substance.

1986-1987 Construction and Demolition Debris Shipments

CII has conceded that it transported from 5,000 to 7,500 cubic yards of construction and demolition debris to the Skinner Landfill. CII believes that the best evidence in the record – the Skinner Log - supports this claim. Further, none of the Skinner Landfill "residents" identified Marty Clarke/All-Star Container as a frequent customer of the site. Instead, those witnesses routinely identified Dick Clarke, King, and Whitton as the most frequent contributors of construction/demolition debris to the site.1

Although CII believes the Skinner log is accurate with respect to 1986/1987 deliveries from CII, two of your assumptions regarding CII's total disposal based upon the log are inaccurate. First, CII believes your assumption regarding the unit disposal cost is slightly low. Instead of $1.17 for the 30 cubic-yard boxes, CII believes the price it was charged was more accurately $1.33 ($40 for a 30 cubic yard box per Marty Clarke's

1 The following analysis does not even take into account the evidentiary hurdles involved in proving that the construction and demolition debris contained hazardous substances

deposition). Second, CII continues to maintain that Mrs. Skinner has inaccurately recorded a $2,000 entry in her log for 1987. When I attempted to have her explain why she had three dollar values for two payments, she could not explain it. Thus, CII believes that the proper amount paid to Mrs. Skinner in 1987 is $5,825 instead of $7,825. Thus, the total amount CII paid to Mrs. Skinner was $9,298 in 1986 and 1987. Using the foregoing assumptions, CII believes that it disposed of at total of 6,457 cubic yards of material at the Skinner site in 1986 and 1987.

There is simply no way to confirm or refute the foregoing number, or in fact your estimate of 8,128 cubic yards, using Mr. Blevins' testimony. As a preliminary matter, Mr. Blevins is a poor witness. It is therefore difficult to see how a court would afford his testimony much weight. Setting his credibility aside, he has specific recollection of a few customers and only approximately 30 or 40 shipments of materials to Skinner. Furthermore, his recollection as to the contents of those shipments is even less clear, and it is difficult to envision how anyone could prove that all of the shipments he took to Skinner contained hazardous substances. For example, he remembers shipping sand and gravel from one site, which even under a broadly construed definition of "hazardous substance" would not give rise to liability. Finally, the attenuated chain of assumptions derived from Mr. Blevins' testimony ignores the fact that Marty Clarke's roll-off business did not operate at the same level for seventeen months. Marty essentially started the roll off business from scratch. CII's increase in business from 1986 through July 1987 is reflected in the amounts paid to Mrs. Skinner, as the amounts in a seven month period of 1987 were nearly twice as high as the amounts in all (or nearly all) of 1986. Indeed, Mr. Blevins apparently was driving the roll-off truck at the peak of Marty's pre-sale roll-off activity.

Finally, your assumption that the Skinner log is inaccurate and justifies a fifty percent increase from the actual volume transported is arbitrary and unrealistic. First, there is no reason to doubt the veracity of the Skinner log, as they relate to CII's shipments in the 1986/1987 time frame. Mr. Clarke apparently paid Mrs. Skinner regularly, and Mr. Blevins and Mr. Clarke both testified (or would testify in the case of Mr. Clarke) that they picked up a "ticket" every time they delivered a load to the Skinner site. Thus, there is simply no basis for asserting that the Skinner log does not include one third of the shipments from CII in the 1986/1987 time frame.

Limited Ability to Pay

Although you indicated that you believe CII had the ability to pay over $400,000 to settle the case, that simply is not true. Setting aside the fact that CII is a very small business, as you know, Marty's soon to be ex-wife is also laying claim to CII's assets, or the proceeds from the forced sale of the assets. More importantly, U.S. EPA Region V is now calling for

CII to perform a remedial investigation/feasibility study at 2040 East Kemper Road based in part, as I understand, upon the presence of vinyl chloride in ground water at the site. As you know, the performance of an RI/FS, including an investigation of ground water, is an expensive proposition, especially on a 16-acre parcel. It is indeed puzzling how the United States can demand a substantial payment relating to the Skinner site from a small company, yet at the same time, take steps to make that payment impracticable. Obviously, if the government believes that a significant amount of work is required at 2040 East Kemper, CII will not be able to pay over $400,000 for Skinner and then pay for a RI/FS and remedial action. U.S. EPA would then likely have to perform the work itself or order GE, Ford (the other plaintiffs in this case), or any of the other former customers of CII to perform what the government believes is necessary at 2040 East Kemper.

Summary

In sum, CII makes the following counteroffer:

Pre-1967 payments to Skinner	**$1,700** (approximately 10% of demand)
Alleged pre-1967 shipments of so-called cyanide waste to Skinner	**$8,700** (approximate amount reflecting one half of one five-drum shipment of so called cyanide waste)
1986-1987 shipments of construction and demolition debris	**$155,826** (6,457 cubic yards * $24.133 per cubic yard)
Limited Ability to Pay Offset	**(30% or $49,868)**
Total	**$116,358**

As set forth above, CII is willing to pay $116,358 to resolve all claims pending by the government and the PRP plaintiffs arising from the alleged disposal of hazardous substances by Clarke's Incinerators, Clarke Container, and Martin Clarke at the Skinner Landfill. Given CII's limited ability to pay, CII would prefer to pay this amount over a three year period.

BLANK ROME COMISKY & MCCAULEY LLP

Please consider and respond to the foregoing offer.

Sincerely yours,

Jonathan A. Conte

JAC/sl